Supreme Court, U.S.
FILED
DEC 4 - 2009
OFFICE OF THE CLERK

Nos. 09-533, 09-547

In the Supreme Court of the United States

CROPLIFE AMERICA, et al.,
Petitioners,
v.
BAYKEEPER, et al.,
Respondents.

AMERICAN FARM BUREAU FEDERATION, et al.,
Petitioners,
v.
BAYKEEPER, et al.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN MOSQUITO CONTROL ASSOCIATION, NATIONAL ASSOCIATION OF STATE DEPARTMENTS OF AGRICULTURE, LOUISIANA DEPARTMENT OF AGRICULTURE AND FORESTRY, MINNESOTA DEPARTMENT OF AGRICULTURE, NORTH CAROLINA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, AND SOUTH DAKOTA DEPARTMENT OF AGRICULTURE IN SUPPORT OF THE PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

The American Mosquito Control Association ("AMCA"), the National Association of State Departments of Agriculture ("NASDA"), and the Louisiana Department of Agriculture and Forestry, Minnesota Department of Agriculture, North Carolina Department of Agriculture and Consumer Services, and South Dakota Department of Agriculture respectfully submit this brief as amici curiae supporting the petitions for a writ of certiorari filed in Nos. 09-533 & 09-547.

AMCA is a not-for-profit corporation controlled by state and local governmental agencies responsible for mosquito control and is supported primarily by member dues.[2] AMCA members are vitally interested in whether the use of mosquito pesticides in lawful compliance with the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") simultaneously constitutes, as the Sixth Circuit held, the unlawful discharge into water of "pollutants" within the meaning of the Clean Water Act ("CWA").

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[1] Pursuant to Rule 37.2, the counsel for amici state that all parties received at least ten-days notice of amici's intent to file this brief, and that all parties have given their consent to file. Pursuant to Rule 37.6, counsel for amici curiae further state that no counsel for a party authored this brief in whole or in part, and no person other than amici or its counsel made a monetary contribution to this brief.

[2] Although private industry applicators and manufacturers of pesticides are among AMCA's members, private industry interests collectively have only one vote on AMCA's sixteen-member board of directors. Public mosquito control agencies have the other fifteen votes.

NASDA represents the commissioners, secretaries, and directors of the state departments of agriculture in all fifty states and four U.S. territories. As co-regulators with the U.S. Environmental Protection Agency ("EPA"), a majority of NASDA's members are the lead state agencies responsible for administering, implementing and enforcing the laws regulating the production, labeling, distribution, sale, use and disposal of pesticides in their states.

The Louisiana Department of Agriculture and Forestry, Minnesota Department of Agriculture, North Carolina Department of Agriculture and Consumer Services, and South Dakota Department of Agriculture are state agencies with primacy in pesticide matters under FIFRA in each state, respectively. Environmental safety is a prime requisite in the pesticide programs implemented by each department. The Sixth Circuit's decision is likely to disrupt longstanding state regulatory programs and relationships, as well as negatively impact the significant economic contributions from agricultural production in these states.

ARGUMENT

I. The Sixth Circuit's Invalidation of the EPA Rule Seriously Jeopardizes the Public Health

The petitioners provide numerous and well-founded reasons why this Court should grant the petitions for writ of certiorari, but amici write separately to emphasize the potentially grave public health consequences of the flawed Sixth Circuit decision. That decision is a clear and present danger to the public health because it exposes mosquito

control organizations to CWA liability that will impede their mission.

A. Mosquito control is critically important to public health in the United States. *See* EPA and U.S. Center for Disease Control and Prevention ("CDC"), Joint Statement on Mosquito Control in the United States, *available at* http://www.epa.gov/pesticides/health/mosquitoes/mosquitojoint.htm#programs ("Mosquito control activities are important to the public health . . . ."). Worldwide, mosquitoes cause more human suffering than any other organism—over one million people die from mosquito-borne diseases every year.[3] One such disease is malaria.[4] Although malaria was eradicated in the United States during the twentieth century through the use of pesticides, the CDC cautions that "the two species [of mosquito] that were responsible for transmission prior to eradication . . . are still widely prevalent; thus there is a constant risk that malaria could be reintroduced in the United States."[5] Currently, only malaria prevention techniques—including the spraying of insecticides that target mosquitoes—prevent malaria from reemerging in the United States.

Although the current threat of malaria in the United States has abated, the same is not true of other mosquito-borne diseases. Specifically, St.

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[3] Mosquito-Borne Diseases, American Mosquito Control Association, *available at* http://www.mosquito.org/mosquito-information/mosquito-borne.aspx.

[4] http://www.cdc.gov/malaria/.

[5] http://www.cdc.gov/malaria/facts.htm. *See also* Eradication of Malaria in the United States (1947-1951), *available at* http://www.cdc.gov/malaria/history/index.htm#eradicationus.

Louis Encephalitis,[6] Eastern Equine Encephalitis,[7] Western Equine Encephalitis,[8] Dengue Fever[9] and West Nile Virus[10] are all still present in the United States. There is no known vaccine or effective cure for any of these diseases; they are prevented *only* by controlling mosquito populations. In particular, West Nile Virus—which is responsible for the most severe outbreak of mosquito-borne disease in the United States in decades—continues to impact many parts of the country. In the last ten years, over 1,000 Americans have died, and over 10,000 were hospitalized, some with severe permanent disabilities, from this mosquito-borne disease.

B. In the absence of any official guidance on which pesticide applications near water would require National Pollutant Discharge Elimination System ("NPDES") permits under the CWA, and the absence of any guidance on what acceptable permits would encompass, the Sixth Circuit decision's invalidation of the EPA Rule exposes all mosquito control programs in the United States to the imminent threat of CWA suits. Indeed, since the Sixth Circuit issued its decision, twenty-one local mosquito control agencies in California alone have been served by environmental groups with intent to sue notices under the CWA for alleged CWA violations (*i.e.*, using pesticides without an NPDES permit). Such litigation would serve only to disrupt these agencies' critically important efforts to control

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[6] http://www.cdc.gov/ncidod/dvbid/arbor/sle_qa.htm.

[7] http://www.cdc.gov/ncidod/dvbid/arbor/eeefact.htm.

[8] http://www.cdc.gov/ncidod/dvbid/arbor/weefact.htm.

[9] http://www.cdc.gov/ncidod/dvbid/dengue/index.htm.

[10] http://www.cdc.gov/ncidod/dvbid/westnile/index.htm.

mosquitoes and mosquito-borne disease. Further, the cost of defending such litigation and the risk of fines and liability for plaintiffs' attorney fees will compel many of these agencies to abandon essential mosquito control activities or risk bankruptcy.[11]

If the Sixth Circuit decision is allowed to stand, the threat of CWA liability will seriously disrupt or effectively halt many essential mosquito control efforts throughout the United States. This could result in a marked increase in the number of deaths and serious illnesses caused by mosquito-borne diseases such as West Nile Virus.

II. The Sixth Circuit Decision Is Unworkable In Practice

Aside from seriously jeopardizing the public health, the Sixth Circuit decision creates an unworkable legal regime.

A. The Sixth Circuit notes that under its interpretation of the CWA, not all chemical pesticide applications require an NPDES permit. *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927, 936 (6th Cir. 2009). However, the two circumstances identified by the Sixth Circuit as needing a permit under the CWA—where traces of pesticides applied on land or in the air end up in water, or where residues of aquatic pesticides remain in the water, *see id.* at 936-37—effectively require an NPDES permit for all chemical pesticide applications, because operators can never be absolutely certain that traces of such pesticides will not enter water (in the case of

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[11] The temporary stay of the mandate obtained by the government does not obviate this problem because the mere existence of the Sixth Circuit decision has a present *in terrorem* effect on the ongoing activities of mosquito control entities.

pesticides applied on land and in the air), or remain in the water (in the case of pesticides applied directly in the water). In practice, the Sixth Circuit decision will effectively require that operators obtain an NPDES permit for every pesticide application, regardless of when and where the application is made. Because the CWA imposes criminal as well as civil liability, pesticide applicators face enormous risks if they operate without an NPDES permit.

B. Moreover, as discussed previously, mosquito control activities are highly dependant on pesticides. Accordingly, the significant increase in permit applications that would result from requiring an NPDES permit for every mosquito control application would paralyze the permitting process and leave public health officials with no effective mechanism to control pest outbreaks. This is particularly the case given that mosquito control districts must decide within a very brief time which areas to treat for mosquitoes (a planning process that typically must be completed in the span of a few hours, to at most one or two days, if it is to be effective and where such treatment can occur at literally thousands of specific locations).

C. In the more than thirty-five years of administering the CWA, the EPA has never issued an NPDES permit for the application of pesticides. By including pesticide applications under the CWA, the Sixth Circuit decision greatly expands the number of entities that will now need an NPDES permit. Currently, the NPDES program encompasses approximately 520,000 permitted facilities. Under EPA estimates, at a minimum, the Sixth Circuit decision will require an additional 365,000 so-called "applicators" to seek permits for

approximately 5.6 million pesticide applications per year. This represents a nearly two-fold increase in the volume of NPDES permits to be issued.

Even if the stay of the mandate provides the EPA with sufficient time to expand the NPDES permitting system to encompass all of the pesticide "applicators" swept in by the Sixth Circuit decision, the NPDES process is essentially incompatible with the realities of pesticide use for mosquito control. First, EPA regulations require that NPDES permits include monitoring programs. But the extremely large costs of routinely monitoring the constituents of pesticides before and after each application at even a small fraction of application sites would exceed the operational budgets of most mosquito control programs. Second, this type of monitoring would also require dissemination to the mosquito control programs of information on the complete composition of pesticide products—information which, as proprietary business information under FIFRA, cannot be legally provided by EPA or the states to these entities. *See* 7 U.S.C. 136h (d)(1)(C). In other words, a legal NPDES permit would create a condition for which compliance may be impossible—requiring the monitoring of chemical constituents by dischargers notwithstanding the fact that the dischargers cannot legally be provided the names of the chemicals to be monitored.

III. The Sixth Circuit Decision Burdens Farmers and States and Exposes Them to CWA Liability for Pesticide Applications Otherwise Lawful Under FIFRA

In addition to mosquito control agencies, the Sixth Circuit decision has broad (and jarring) consequences for farmers and states.

A. The Sixth Circuit decision requires NPDES permits for aquatic pesticide applications as well as for many terrestrial applications. As all pesticide applications are already regulated under FIFRA, requiring NPDES permits in these circumstances will impose a series of unnecessary, costly and burdensome requirements on farmers. Additionally, at present, neither EPA nor state regulators have the required resources to review the dramatic increase in permit applications that will result from the Sixth Circuit decision. Because of the time-sensitive nature of pesticide applications, the resulting delays will adversely impact the viability of farming operations across the country. Moreover, by impeding necessary pesticide uses to quickly combat emergency infestations, the Sixth Circuit decision could impair food production.

States will also be burdened by the new regime created by the Sixth Circuit decision. Just as the EPA will be designing NPDES permits to comply with the Sixth Circuit decision, forty-five states will be similarly required to develop their own permits to comply with that decision. Under FIFRA, it is the state lead agencies—generally the state departments of agriculture—that have primacy of the enforcement of pesticide matters. The consequence of the Sixth Circuit decision creates a tremendous unfunded regulatory mandate for the state governments. The decision will require states—not just EPA—to issue permits to cover pesticide applications that are already regulated and legal under FIFRA and state pesticide laws, laws that also enforce against the misuse of pesticide applications.

B. Further, by extending its decision to terrestrial applications—under the theory that pesticide applications on land or air may nevertheless have CWA implications if such pesticides end up in navigable waterways—the Sixth Circuit has placed every farmer in the United States in legal jeopardy under the CWA's citizen-action provisions for applications of pesticides that otherwise conform to FIFRA. If the Sixth Circuit decision is left to stand, U.S. farmers—regardless of farm size or produce output—will go into the next growing season under the looming threat of lawsuits. Similarly, states and local governments that apply pesticides along roadways and power lines, among other locations, face the burden of potential CWA litigation if residues of such terrestrial applications that otherwise conform to FIFRA end up in the nation's waterways.

CONCLUSION

For the foregoing reasons, amici request that this Court grant the petitions for a writ for certiorari.

Respectfully submitted,

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Dated: December 4, 2009